Hassan v Republic (Criminal Appeal E012 of 2024)
[2024] KEHC 13273 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13273 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E012 OF 2024

JN ONYIEGO, J

OCTOBER 24, 2024

BETWEEN

ABDIKHEIR MOHAMED HASSAN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentence by Hon. Baraka Xavier Francis in Sexual Offences Case No. E001 of 2024 at Wajir Law Court delivered on 08.03.2024)

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on 20.12.2023 at around 2200hrs, at Wajir county, he intentionally caused his penis to penetrate the vagina of HMO a child aged sixteen years.

2. The appellant faced an alternative count of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. The particulars were that on 20.12.2023 at around 2200hrs, atn Wajir county, he intentionally touched the vagina of HMO a child aged sixteen years.

3. He pleaded not guilty to the charges after which a trial was conducted in which the prosecution presented the evidence of 4 witnesses. Consequently, he was convicted and sentenced to 13 years imprisonment.

4. PW1, HMO narrated that on 20.12.2023, she left home to town to go pick her mother when she met the appellant who offered her a lift in his tuk tuk. That upon refusing to board the said tuk tuk, the appellant forced her to board and consequently took her to xxxxx where he locked her inside some house.

5. She stated that at 12 a.m, she realized that she did not have her panty on while her derah had been lifted to her waist. She told the court that she felt some abdominal pain and that she could not go for either a long or short call. It was her testimony that, she started screaming thus attracting people who surrounded the house. That in the process, the appellant who was armed with a knife blocked her from leaving and at the same time threatened her. It was her evidence that the appellant told her that if she had to leave then, she had to cover herself with the sheet and leave the blood soiled clothes behind.

6. She further stated that, she managed to escape and sought refuge at Mrs. K's house. That the appellant ran after her while threatening that he would kill anyone who offered her help. She was later taken to the hospital for medical attention.

7. PW2, HMH testified that on the material day, she was at her home when she heard some noise. That upon getting out of the house, she met PW1 while half covered. It was her evidence that the appellant herein was chasing the girl. While there, the appellant informed her, together with Mrs. B and Mrs. A that he had an agreement with PW1 and therefore, PW1 ought not lie to them. That the appellant had no cloth on him save for a piece of cloth on his waist.

8. It was her evidence that the appellant was her neighbour and therefore, a person known to her. She stated that they threatened to beat up the respondent in case he failed to produce PW1's clothes. According to her, the appellant was responsible for the offence herein. On cross examination, she stated that the complainant was crying while in pain and in a lot of fear. That pw1 later told her that the appellant had promised to take her to his sister to sleep there but ended up keeping her in his house and thereby defiling her.

9. PW3, No. 2****4 PC CM the investigating officer, received the sexual assault report, recorded witness statements and issued PW1 with a P3 Form. He stated that after completing investigations, he arrested the appellant and then charged him with the offence of defilement.

10. PW4, Siyad Saney Hassan, a clinical officer who testified on behalf of Mr. Charles Kirui who filled the p3 form recalled that on 21st December 2023, the complainant visited their hospital facility accompanied by police officers and relatives. It was reported that she had allegedly been defiled. Upon examination, it was noticed that she was anxious, had normal external genitalia with no bruises and had an assaulted and injured hymen with whitish per vaginal discharge. She also presented neck tenderness with no other visible injuries.

11. The witness further stated that the genital examination showed no injuries in relation to the offence herein. He proceeded to state that the said injuries were old but could not tell how long. He produced the treatment notes, the P3 and PRC Form as Pex. 2,3 and 4 respectively. On cross examination, he stated that before the alleged date of incident, there was a sexual assault on the complainant but the same had healed.

12. The appellant (DW1) on his defence denied the alleged events of the day in question and explained that he was heading for work when he was arrested and taken to police station. He stated that he did not know the complainant nor the reasons for his arrest. His case was that he had been framed by the complainant. He further added that the chief had a grudge with him and therefore, this was a way of paying him back. He reiterated that PW4 confirmed that the complainant was not new to such acts and therefore, it could not be pinned on him that he was responsible for the assault. He blamed one Mohamednoor, his in-law for his predicament.

13. In his judgment, the trial court found that the prosecution had established its case beyond reasonable doubt and thereby convicted and sentenced him to serve 13 years' imprisonment.

14. Dissatisfied with the conviction and sentence, the appellant filed the instant appeal in which he listed the following grounds: -

    i. That the trial magistrate erred in law and fact by failing to give due regard to the material contradictions, discrepancies and inconsistencies in the prosecution case thereby reaching a wrong decision.

    ii. That the trial magistrate erred in points of law by holding that the prosecution proved its case to the required standards.

    iii. That the trial magistrate erred in law and fact by rejecting the appellant's defence without any good reason for doing so.

15. The court directed that parties file their written submissions but the respondent chose to argue the appeal orally while the appellant chose to rely on his undated written submissions.

16. The appellant submitted that the prosecution did not prove the offence herein to the required standard noting that some of the evidence like the alleged soiled derah was not presented before the court. It was his contention that the prosecution evidence was not only contradictory but also uncorroborated for the reason that the medical officer stated that the alleged injury suffered by the complainant was not fresh. That penetration was thus not proved and therefore, the offence herein could not be sustained. He argued that to the contrary, the trial magistrate shifted the burden to him to prove his innocence. He urged this court to allow his appeal and thereafter set him free.

17. On the other hand, the learned prosecutor opposed the appeal by stating that the prosecution proved its case beyond any reasonable doubt. That the evidence was not only cogent but also admissible and therefore, conviction of the appellant was regular. He contended that the appeal herein is devoid of any merit as the evidence by the prosecution was overwhelming leading to a sound finding by the trial court. He urged this court to dismiss the appeal herein.

18. The duty of a first appellate court was explained in the case of *Mark Oiruri Mose vs R* (2013) eKLR thus: -"This Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence hence give due allowance for that."

19. Having considered the record of appeal herein and submissions of both parties, I discern issues for determination as follows;

    i. Whether the offence of defilement was proved to the required standard.

    ii. Whether the sentence meted out was appropriate.

20. It is trite that in a criminal case, the burden of proof always rests with the prosecution to prove its case against the Appellant beyond reasonable doubt. In *Stephen Nguli Mulili vs Republic* [2014] eKLR, it was held that: -"[I]t is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of *DPP vs Woolmington*, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. [Also see *Festus Mukati Murwa vs R*, [2013] eKLR].

21. The appellant in this case was charged with the offence of defilement under Section 8 (1) of the *Sexual Offences Act* which provides as follows:

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement. Sub-section (4) prescribes the penalty by stating that; A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

22. The above provision requires the prosecution to present evidence to prove three key ingredients of the offence of defilement, namely; the age of the victim, penetration and the positive identification of the assailant. The said ingredients were outlined in the case of *Charles Wamukoya Karani vs Republic*, Criminal Appeal No. 72 of 2013 [2015] eKLR as follows: -

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

23. In the present case, I note that the victim testified that she was 16 years old at the time in question. She produced her birth certificate as Pex 1 which showed that she was born on 01.01.2007. The offence herein allegedly occurred on 20.12.2023. It therefore follows that the complainant was aged 16 years, 11months and 11 days at the time when she was allegedly defiled. As such, I am satisfied that the first ingredient of minority age of the complainant was proved to the required standards.

24. Turning to penetration, Section 2 of the *Sexual Offences Act* defines penetration as follows: -The partial or complete insertion of the genital organ of a person into the genital organs of another person.

25. Penetration can be proved through the victim's sole testimony or through the victim's testimony corroborated by medical evidence. The appellant challenged the fact that the medical report never linked him to the offence and further, the same did corroborate the evidence by the other prosecution witnesses on the occurrence of the offence herein. It is trite that the oral evidence of a single witness is indeed sufficient to warrant a conviction. In *Kassim Ali vs Republic* [2006] eKLR it was held;

> " ... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

26. In the same breadth, in the case of *George Kioji vs R* Nyeri Criminal Appeal No. 270 of 2012 (unreported) it was held that;

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

27. In my view and as already mentioned, the medical evidence showed that the complainant's hymen was absent although not freshly broken. The same therefore shows that for this court to reach a conviction, this court must turn to the circumstantial evidence available and the same should be woven together to point at the appellant's culpability.

28. The appellant urged that on the material day, he was not in locus quo and therefore, he was simply framed. The arguments by the appellant brought about the defence of alibi and it is not lost to this

court that the burden of proving the falsity of the defense of alibi rests on the prosecution. [See *Victor Mwendwa Mulinge vs R* [2014] eKLR].

29. However, the Court of Appeal in *Erick Otieno Meda vs Republic* [2019] eKLR while discussing the defence of alibi laid down rules to be applied in considering the defence of alibi and the Learned Judges of Appeal held as thus; -

> " 23. The comparative decisions cited above are persuasive and espouse good law which we adopt herein. In considering an alibi, we observe that:
>
> An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
>
> An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
>
> The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
>
> (d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. [See *Mhlungu v S (AR 300/13)* [2014] ZAKZPHC 27 2014].

30. Be that as it may, the elements as set above were not met as most importantly, the said defence was not raised in good time to allow the prosecution to disprove the same and further, the appellant's evidence remained uncorroborated. In my view, the appellant's a libi cannot be correct. The evidence of pw2 confirmed that the appellant was present and was actually running after pw1 while claiming that they had agreed. That the appellant was not wearing clothes at the material time. With this kind of testimony, the alibi defence raised by the appellant cannot hold.

31. On the other hand, PW1 testified that on the fateful day at 12 a.m, she realized that she did not have her panty while her derah had been lifted to her waist. The panty, derah and the short dress were all soaked in blood. She felt some abdominal pain and further, learnt that she could not go for either a long or short call. PW2 corroborated the evidence of the complainant when she testified that when she heard noise from outside her house, she went out only to see a naked girl. She stated that upon the complainant's clothes being brought, she noted that the derah, undergarment and the trouser were bloody. Equally, the recordings on the PRC form also noted the presence of blood soiled clothes.

32. In the appellant's attempt to state that he was framed, the question that I ask myself therefore is, what gain would PW2 achieve by fixing the appellant? In my own view, no evidence was presented to intimate any form of grudge between the appellant and PW2; the foregoing notwithstanding, the appellant intimated that the grudge that existed was between him and the chief hence not PW2. In the same breadth, PW4 testified that the complainant upon being examined, it was noted that she had an assaulted and injured hymen with whitish per vaginal discharge which ordinarily characterizes a sexual activity. As such, it is my view that the element of penetration was ably proved by the prosecution.

33. Turning to the third ingredient, positive identification of the perpetrator of the offence, I note that the complainant identified the appellant herein as her aggressor. This is so for the reason that at the time the duo spent together right from the place where the appellant granted her lift to the house that he finally defiled her in, the same was sufficient time to enable a proper identification. [See *Maitanyi vs Republic*, (1986) KLR 196; *Wamunga vs Republic* (1989) KLR 426]. PW1's evidence was corroborated with PW2 who testified that the appellant was the person responsible for the complainant's injuries as

they were neighbours. Additionally, that when she came out of her house upon hearing the noise, she noticed that the appellant was chasing the complainant while telling her that she had agreed with the complainant and therefore, she should not be convinced otherwise.

34. Applying the principles expressed in the above cited cases to the instant case, I note that the complainant's testimony on the issue of whether the assailant was a total stranger or a person she had seen before the incident was proved to the required standard.

35. I therefore find that grounds 1,2 and 3 of the petition of appeal are baseless since conviction was found on grounded legal provisions.

36. On sentence, the law provides that a person liable for defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years. In the case herein, the appellant was sentenced to serve 13 years imprisonment noting that he previously spent time in lawful custody during the pendency of hearing of the case herein. It is my view that nothing has been presented before this court to establish that the said sentence is unlawful and as such, I dismiss the appeal in its entirety and uphold the finding by the trial court.

ROA 14 days

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF OCTOBER 2024

J. N. ONYIEGO

JUDGE